# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

#### POMPTONIAN FOOD SERVICE

and Case Nos. 22-CA-086029

22-CA-104206

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ

Michael Silverstein, Esq., for the General Counsel Mark Vidovich, Pomptonian, Inc., Fairfield, New Jersey, for the Respondent Brent Garren, Esq., SEIU Local 32BJ, New York, New York, for the Charging Party

# **DECISION**

# Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case No. 22-CA-086029, filed on July 26, 2012, and upon a charge in Case No. 22-CA-104206, filed on April 30, 2013 and amended on May 16, 2013, by Service Employees International Union, Local 32BJ ("Local 32BJ" or "the Union"), an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the "Complaint") issued on July 17, 2013. The Complaint alleges that Pomptonian Food Service ("Pomptonian" or "Respondent"), violated Sections 8(a)(1) and (5) of the Act by refusing to bargain collectively with the Union as the exclusive representative of the bargaining unit employees and by withdrawing recognition from the Union on or about December 6, 2012. Respondent filed an Answer denying the Complaint's material allegations. This case was tried before me on January 15, 2014, in Newark, New Jersey.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the arguments of the parties made at trial and in their post-hearing briefs, I make the following

# Findings of Fact

# I. Jurisdiction

At all times material to the complaint's allegations, Respondent has been a corporation with an office and place of business in Verona, New Jersey, and has been engaged in the business of providing food services for the Verona, New Jersey School District, among other locations in the State of New Jersey. Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7)

of the Act. Respondent further admits and I find that at all material times Local 32BJ has been a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Respondent's Operations, the Collective Bargaining Agreement, and the Events of 2012

As discussed above, Respondent provides food services for a number of School Districts in the State of New Jersey, including the Verona School District. Respondent and Local 32BJ are parties to a collective bargaining agreement recognizing Local 32BJ as the exclusive collective bargaining representative of "all full-time and part-time food service workers" employed "at the Verona School District," excluding managers and a number of other enumerated classifications. The most recent collective bargaining agreement between the parties was effective by its terms from September 1, 2010 through August 25, 2012. Candy and Mark Vidovich are Respondent's owners; Candy Vidovich testified at the hearing and Mark Vidovich represented the Respondent.<sup>1</sup>

Vincenza Ramirez, who testified at the hearing on behalf of General Counsel, is a union representative for Workers United and was assigned certain contract negotiation and enforcement responsibilities pertaining to Local 32BJ for about 1½ years, beginning in March 2012. Part of Ramirez's responsibilities included administering and enforcing Local 32BJ's contract with Respondent. At that time, there were seven Pomptonian employees covered by the collective bargaining agreement, who were employed at the Whitehorne Middle School and at the Verona High School. On March 27, 2012,² Ramirez sent an e-mail to Howard Grinberg, Pomptonian's Director of Operations, introducing herself and asking to visit the Verona School District on April 3. Ramirez wanted to introduce herself to the Respondent's employees, inquire as to any potential contract enforcement issues, and inform the employees regarding upcoming contract negotiations. Grinberg responded the next day, stating that Ramirez could visit the employees on April 3 as long as her activities did not interfere with their work or the services provided to the District.

As part of her union representative duties, Ramirez was responsible for collective bargaining negotiations with Respondent. Accordingly, on May 10, she wrote to Grinberg suggesting dates to begin negotiations for a successor agreement, and requesting information regarding the bargaining unit employees and their terms and conditions of employment. Grinberg responded the next day, stating that he would get back to her the following week. On May 16, Grinberg e-mailed Ramirez suggesting that negotiations begin on June 20, and responding to Ramirez's request for information. Ramirez confirmed the initial date for negotiations with him by e-mail the next day.

Ramirez testified that some time in June, the Union received a petition stating as follows:

To whom it may concern

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From: HB Whitehorne, Verona Middle School Cafeteria staff.

<sup>&</sup>lt;sup>1</sup> Although Respondent was apparently represented by counsel at one time (*See* G.C. Ex. 1(e)), Respondent elected to proceed with the hearing *pro se* (Tr. 8-9).

<sup>&</sup>lt;sup>2</sup> All subsequent dates are in 2012 unless otherwise indicated.

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We, the staff of the Pomptonian Food Service of the Verona School district, HB Whitehorne has come to an agreement to cease the contract with SEIU Local 32BJ upon expiration date of the August 25, 2012, as per our contract from September 1<sup>st</sup>, 2010 to August 25, 2012: based on the Article XXXV-Duration. There are more the sixty(days) from the expiration date. The Pomptonian Food Service will be notified of our decisions in writing for the termination of the contract with our staff at HB Whitehorne. The following signature will follow in agreement of our decision. We appreciate full professional cooperation. We thank you for the two years of representation.<sup>3</sup>

Staff signatures

**Dates** 

15 This petition contained four signatures.4

On June 19, Respondent filed a petition in Case No. 22-RM-083604 seeking a representation election, and on July 3, the parties entered into a Stipulated Election Agreement scheduling the election for September 13. On June 21, Grinberg sent Ramirez a letter stating as follows:

On June 12, 2012 a member of the Verona School District's bargaining unit presented the Food Service Director with a copy of a letter that stated, among other things, that the undersigned employees wanted to "cease the contract with SEIU Local 32BJ." The letter was signed by a majority of the bargaining unit members. The employee also stated orally that the employees "wanted to get out of the union" and they were "sending a copy to the union."

Based upon the above, we have a good faith doubt that the SEIU has continued majority support and have filed a petition for an election with Region 22 of the NLRB. Because the letter was signed by a majority of the bargaining unit employees, we are formally notifying you that we are suspending the current negotiations. Of course, we will continue to recognize your organization as the Verona employee's exclusive representative until the expiration of the contract. The outcome of the petition process will dictate how we will proceed otherwise in the future.

On July 17, Phoebe Schell, Local 32BJ's Food Service Director, sent an e-mail to Grinberg stating that the Union "protested" the company's suspension of negotiations, and that "We...insist that you bargain with us." Schell requested that Grinberg provide additional dates for bargaining. Grinberg responded on July 25 that Pomptonian had no duty to bargain for a successor agreement given the "objective evidence," in the form of the employees' petition, that Local 32BJ had lost majority support. Grinberg further stated that "Rather than notify you of an anticipatory withdrawal, we felt that the best course of action for all parties was to petition of an election to be held upon the employees' return." Grinberg reiterated that Respondent would

<sup>&</sup>lt;sup>3</sup> In my quotations from various documents prepared by the parties in this case, I have not corrected for errors in grammar and spelling, since the text of some documents is legally significant.

<sup>&</sup>lt;sup>4</sup> There is no dispute regarding the validity of the signatures or the identities of the individuals that signed the petition.

continue to recognize the Union as the employees' exclusive collective bargaining representative until the contract's expiration.

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On July 25, Mark and Candy Vidovich sent letters to the bargaining unit employees regarding the upcoming election. The July 25 letter states that Respondent had "received a copy of a letter which was sent to the SEIU and signed by a majority of our employees in the Verona School District," which "stated that the employees no longer wanted to be represented by the union." After providing the logistical details of the upcoming election, the letter goes on to inform the employees that

In this election you will be deciding whether it is worth having portion of your income deducted from your paycheck to pay for union dues. We at Pomptonian believe that our employees should not have to pay to come to work. As a matter of fact, the overwhelming majority of our employees have chosen to remain "union free." In those places we are able to work directly with our employees to ensure a harmonious work environment.

On September 10, Ramirez e-mailed Grinberg to inform him that she intended to visit the employees at the Verona School District the following week, and after making arrangements with Grinberg, she did so. The election took place on September 13, and the ballots were impounded by Region 22. However, when Ramirez wrote to Grinberg in order to visit the bargaining unit employees in early December, Grinberg responded as follows:

Please let us know what day you are requesting to visit. We can check with the School District to help to secure permission to enter the building. By no means does Pomptonian or the District, by granting permission to visit, indicate that we recognize your Union as the bargaining representatives for these individuals in Verona. This permission would be granted to any group with a legitimate need to meet with the people who work in the cafeteria at this location.

On May 13, 2013, Ramirez wrote to Grinberg once again, stating that the Union was "moving forward with negotiations," and requesting information regarding the bargaining unit employees, the work they performed, and their terms and conditions of employment. Grinberg responded the next day, telling Ramirez, "As you are well aware, the people in the VERONA school district have asked us not to recognize the union." Respondent never provided the Union with the information Ramirez requested, and never negotiated with the Union for a successor collective bargaining agreement.

# III. Analysis and Conclusion

It is well-settled that a union enjoys a conclusive presumption of majority status during the life of a collective bargaining agreement, with a maximum of three years.<sup>5</sup> *Auciello Iron* 

<sup>&</sup>lt;sup>5</sup> In its Answer to the Complaint, Respondent contended that the National Labor Relations Board's agents and delegates lacked authority to act on the Board's behalf because Board lacked a proper quorum. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). The Board has held that because this issue has not been definitively resolved given the conflicting opinions of at least three other Circuits, the Board "is charged to fulfill its responsibilities under the Act." *See, e.g., Belgrove Post Acute Care Center*, 359 NLRB No. 77, at p. 1 (2013), citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). In addition, the Continued

Works, Inc. v. NLRB, 517 U.S. 781, 786 (1996). In order to determine whether an employer has lawfully withdrawn recognition from a union, the Board applies the standards articulated in Levitz Furniture of the Pacific, 333 NLRB 717 (2001). Under Levitz, an employer may unilaterally withdraw recognition from an incumbent union "only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." 333 NLRB at 725; see also Port Printing Ad & Specialties, 344 NLRB 354 (2005), enf'd, 192 Fed.Appx. 290 (5<sup>th</sup> Cir. 2006). The employer bears the burden to prove by a preponderance of the evidence that the union has actually lost the support of the majority of the bargaining unit employees. Levitz, 333 NLRB at 725. The union in such circumstances is not obligated to establish that it still enjoys majority support. Fremont Medical Center & Rideout Memorial Hospital, 354 NLRB. No. 68 at p. 1, 7-8 (2009), 359 NLRB No. 51 (2013) (3 member Board); HQM of Bayside, LLC, 348 NLRB 758, 759 (2006), enf'd, 518 F.3d 256 (4th Cir. 2008). By contrast, the Board held in Levitz that in order to file an RM petition the employer need only demonstrate a good-faith reasonable uncertainty as to the union's majority status. 333 NLRB at 717, 727. The employer's obligation to recognize and bargain with the union, however, continues while RM election proceedings are pending. Levitz, 333 NLRB at 726-727.

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In the instant case, General Counsel contends that Respondent violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union for a successor collective bargaining agreement since on or about June 21, 2012. In particular, General Counsel argues that the processing of the RM petition filed by Respondent did not relieve Respondent of its obligation to bargain with the Union absent evidence sufficient to rebut the presumption of the Union's majority status. General Counsel contends that because the language of the petition provided to the Union and Respondent in June was too ambiguous to establish that the employees no longer wished to be represented by the union, the petition did not constitute evidence of actual loss of majority support sufficient to obviate the bargaining obligation. Because Respondent ultimately withdrew recognition on the basis of the June petition, its withdrawal of recognition was also not premised upon evidence of actual loss of majority support, and violated Sections 8(a)(1) and (5) of the Act as well.

Charging Party joins in the contentions made by General Counsel, but also argues that even if the language of the petition were sufficiently clear to establish the actual loss of majority support necessary to justify a withdrawal of recognition, Respondent, by its own explicit statement, did not make an anticipatory withdrawal of recognition. Because Respondent did not effect an anticipatory withdrawal of recognition, and repeatedly stated that it would comport itself in accordance with the results of the election, its refusal to bargain prior to the contract's expiration was unlawful for that reason as well.

The evidence adduced at the hearing does not establish the Union's actual loss of majority status, such that Respondent's refusal to bargain and withdrawal of recognition were legitimate. In particular, the language of the petition signed by the employees and sent to the Union and Respondent is inadequate to establish a loss of majority status. In the past, the Board has held that a petition which unequivocally stated that the employees "did not support the Union and were in favor of withdrawing recognition" was sufficient to establish, with the requisite number of signatures, an actual loss of majority status. *Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1284-1286 (2006). The Board has also found that a petition stating that the

Board has held that the authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints is derived from the National Labor Relations Act itself, and not from "any power delegated by the Board." *Bloomingdale's*, *Inc.*, 359 NLRB No. 113 (2013).

employees "wish for a vote to remove the Union" established an actual loss of majority status, in that its "more reasonable" interpretation was that the employees wished to end the union's status as their collective bargaining representative. *Wurtland Nursing & Rehabilitation Center*, 351 NLRB 817, 818 (2007). By contrast, a petition entitled, "Showing of Interest for Decertification," together with documents asserting that the employees involved sought an election, as opposed to a withdrawal of recognition, was inadequate to establish that the employees no longer supported the Union. *Highlands Regional Medical Center*, 347 NLRB 1404-1406 (2006). As a result, the Board concluded in that case that the employer's withdrawal of recognition violated Sections 8(a)(1) and (5). *Highlands Regional Medical Center*, 347 NLRB at 1406-1407.

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An actual loss of majority support is even less evident from the language of the petition at issue here. The petition in the instant case does not make any mention of the employees' lack of support for the Union or a withdrawal of recognition, and does not refer to a vote to decertify or remove the Union in any way. The petition begins by stating that the employees "has come to an agreement to cease the contract with SEIU Local 32BJ upon expiration date of the August 25, 2012." The petition then explicitly refers to Article XXXV-Duration of the collective bargaining agreement. Because Article XXXV provides that the contract will automatically renew from year to year unless a party gives 60-days notice of its intent to terminate the contract as of its expiration date, this is clearly addressed solely to the termination of the contract, as opposed to a removal of the Union as collective bargaining representative. The petition goes on to state that Respondent "will be notified of our decisions in writing for the termination of the contract with our staff" (emphasis added). Again, this sentence refers solely to the termination of the collective bargaining agreement, and not to a lack of support for the Union as collective bargaining representative. The petition's final sentence, "We thank you for the two years of representation," in the context of the petition's previous statements, is more reasonably interpreted as referring to the approximately two year term of the collective bargaining agreement (September 1, 2010 to August 25, 2012), and not to a lack of support for the Union as collective bargaining representative. As a result, the language of the petition does not establish an actual loss of majority status, and Respondent's consequent refusal to bargain and withdrawal of recognition was unlawful.

I do not find that the testimony of Maria Caggiano, who apparently prepared the petition and provided it to other employees to sign, substantially contradicts the petition's relatively straightforward meaning. See Highlands Regional Medical Center, 347 NLRB at 1404 (considering statements of employees soliciting signatures in order to determine petition's purpose). Indeed, Caggiano testified that she prepared the petition "based on" Article XXXV, the provisions regarding termination of the collective bargaining agreement, as opposed to any language involving Union representation (Tr. 58). Caggiano stated that she told the other employees that the petition meant "That we didn't want to be in the Union," and that "They all agree" before signing it in front of her (Tr. 57). However, she also testified, and her affidavit indicates, that she was out of work due to a disability from May 19 until September 18, and she provided no additional information as to how or when she met with the other employees in order to discuss and execute the petition (Tr. 61-62; G.C. Ex. 15, p. 1). Finally, Caggiano's testimony regarding her interactions with Respondent was contradictory and inconsistent. She initially testified that after mailing the petition to Respondent she informed her supervisor, Annisa Detto, that the company would be receiving the petition. Caggiano claimed that in response to Detto's questions she told Detto that the employees signed the petition because "we want out of the Union and that's it" (Tr. 60-61). When asked to describe her remarks to Detto a second time on direct examination, however, Caggiano testified that she told Detto, "I sent a letter to the company and one to the Union that I want out of the Union" (Tr. 62 (emphasis added)). Furthermore, despite her testimony in this regard, in her affidavit, sworn to on October 3,

Caggiano stated, "I did not have any conversations with anyone from Pomptonian about the letter" (G.C. Ex. 15, p. 1). Caggiano attempted to explain this discrepancy by stating that when she spoke to the Board Agent preparing the affidavit she was in significant pain, and that "I wasn't really paying attention what she was saying on the other side of the phone and what I was saying, what was my answer" (Tr. 78). Caggiano's assertion that she took such a slipshod attitude toward a sworn statement regarding the petition that she herself took the time and effort to prepare is inherently implausible. Finally, Caggiano claimed that she did call Detto, but "just to tell that I sent a letter and no other," and stated that Detto did not ask her any questions about the petition, nor did she provide any additional information (Tr. 78-79). For all of the foregoing reasons, I do not find Caggiano to be a reliable witness with respect to this issue. As a result, her testimony ultimately does not support the conclusion that, contrary to the relatively clear language of the petition, the petition was intended to communicate that the employees no longer supported the Union.<sup>6</sup>

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I also reaffirm my ruling, which Respondent urges me to reconsider in its Post-Hearing Brief, sustaining General Counsel's objection to Respondent's Exhibit 3, and refusing to admit the document into evidence. This document is a copy of an e-mail from manager Anissa Detto to Candy Vidovich, Respondent's co-owner, regarding a purported conversation with Caggiano, where Caggiano allegedly informed Detto that the employees no longer wanted to be in the Union and had signed a petition to that effect. The document is obviously non-probative hearsay with respect to the truth of Caggiano's statements with regard to any employee other than herself, and Caggiano's testimony is more competent evidence of her own understanding regarding the petition's meaning. In addition, the e-mail was offered through Vidovich, as Detto was not called to testify at the hearing. The Board has repeatedly rejected such hearsay evidence of purported employee dissatisfaction offered to establish a loss of majority status. See HTH Corp., 356 NLRB No. 182 at 2, fn. 9 (2011) (offer of proof regarding "general consensus that employees did not support the Union" properly rejected); Port Printing Ad & Specialties, 344 NLRB at 357, n. 9 (where Respondent must show an "actual loss of majority support, it should have called the four employees and not tried to rely on the challenged and unchallenged hearsay testimony" of Respondent's owners).

In addition, none of the exceptions to the general rule excluding hearsay discussed by Respondent in its Post-Hearing Brief are applicable. Detto's e-mail is not a present sense impression under Federal Rule of Evidence 803(1), in that it was prepared by Detto on June 15, three days after the purported conversation with Caggiano that it describes. As a result, the e-mail was not written "while or immediately after" the events Detto recounts, and it therefore lacks the "substantial contemporaneity of event and statement" necessary to "negate the likelihood of deliberate or conscious misrepresentation" as contemplated by the Rule. Rule 803(1) Advisory Committee Notes. Nor is there any foundation for admitting Detto's e-mail as a record of Respondent's regularly conducted activity under Rule 803(6). There is no evidence whatsoever as to Respondent's regularly conducted activities in this regard, and no evidence establishing that Detto's e-mail was a regular practice of Respondent's routine activities.

Finally, I find that the residual exception, Rule 807, is inapplicable. Caggiano herself testified

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<sup>&</sup>lt;sup>6</sup> Because Respondent appeared at the hearing *pro se*, I explained certain basic evidentiary and procedural concepts, such as Respondent's prerogative to review pre-trial statements adopted by General Counsel witnesses prior to cross-examination pursuant to Board Rules and Regulations, Section 102.118(b) (Tr. 44-45, 69-70). Respondent did not present any other employee witnesses to testify regarding their lack of support for the Union, despite my repeated exhortations that Respondent provide direct evidence of an actual loss of majority status (Tr. 67-68, 83-84, 91-93).

regarding the same events, so that the e-mail is not more probative than other available evidence, and Detto was not called to testify at the hearing, despite her managerial or supervisory position. Furthermore, Advisory Committee Notes to Rule 807's precursor emphasized that the residual exception was to be applied "very rarely," and only in "exceptional circumstances." Rule 803(24) Advisory Committee Notes. Given the Board's previous disregard of hearsay and requirement of direct evidence in cases involving an alleged actual lack of support for continued union representation, the application of the residual exception here is not appropriate. *HTH Corp.*, 356 NLRB No. 182 at 2, fn. 9; *Port Printing Ad & Specialties*, 344 NLRB at 357, n. 9.

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Finally, I find that Respondent's refusal to bargain with the Union as of June 21, 2012, as alleged in the Complaint, was not permissible under the line of cases regarding "anticipatory withdrawal of recognition," as argued Respondent argues. Under the "anticipatory withdrawal" cases, where the employer has a good faith uncertainty that the incumbent union has lost majority support within a reasonable time prior to the collective bargaining agreement's expiration, the employer may refuse to negotiate a successor agreement and announce that it will withdraw recognition when the contract actually expires. *Levitz*, 333 NLRB at 730, n. 70; see also Parkwood Developmental Center, 347 NLRB 974, 975 (2006), enf'd, 521 F.3d 404 (D.C. Cir. 2008); see also HQM of Bayside, 348 NLRB at 760, n. 19; Burger Pits, Inc., 273 NLRB 1001 (1984). In such a situation, the employer must continue to apply the terms of the collective bargaining agreement until its expiration. *Levitz*, 333 NLRB at 730, n. 70; see also Parkwood Developmental Center, 347 NLRB at 975, n. 10. In addition, the employer if challenged must prove an actual loss of majority support on the date that recognition is subsequently withdrawn after the contract's expiration. *Parkwood Developmental Center*, 347 NLRB at 975-976.

I find that the circumstances here are incompatible with an anticipatory withdrawal of recognition, and preclude the doctrine's application. By filing an RM petition and initiating election proceedings, Respondent selected a route which was fundamentally incompatible with an anticipatory withdrawal of recognition. As discussed above, during RM proceedings the bargaining obligation would continue until the Union's representative status was determined in the context of a Board-supervised election. By contrast, if Respondent were in fact making an anticipatory withdrawal of recognition, it would cease bargaining and withdraw recognition of its own volition after the collective bargaining agreement's expiration. In addition, the record evidence here contains repeated denials on Respondent's part that it was effecting an anticipatory withdrawal of recognition, and assertions that it had opted instead to address the issue of the Union's representative status through the RM election process. For example, Respondent explicitly denied in Grinberg's July 25 letter that it was making an anticipatory withdrawal of recognition. Indeed, Grinberg stated that "Rather than notify you of an anticipatory withdrawal, we felt that the best course of action for all parties was to petition of an election to be held upon the employees' return." He thus acknowledged that initiating an RM proceeding, with its attendant ongoing bargaining obligation, and an anticipatory withdrawal of recognition were mutually exclusive courses of action. Respondent also asserted both in its June 21 letter and at the hearing in this matter that it would abide by the results of the election in the RM proceeding (Tr. 96-97), a position inconsistent with a contention that it would withdraw recognition after the expiration of the collective bargaining agreement. Furthermore, even if Respondent had declared that it was effecting an anticipatory withdrawal of recognition, it has not presented evidence to establish an actual loss of majority support for the Union at the time of the contract's expiration. Parkwood Developmental Center, 347 NLRB at 975-976. In these

circumstances, Respondent's attempt to avail itself of the anticipatory withdrawal of recognition doctrine is unsuccessful.<sup>7</sup>

For all of the foregoing reasons, Respondent violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with and withdrawing recognition from the Union.

# Conclusions of Law

1. The Respondent, Pomptonian Food Service, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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- 2. Service Employees International Union, Local 32BJ, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Union has been the exclusive representative for the purposes of collective bargaining of the employees in the following bargaining unit pursuant to Section 9(a) of the Act:

All full-time and part-time food service workers employed solely by Pomptonian Food Services at its Verona School District facilities.

- 4. By refusing to bargain with the Union as the exclusive representative for the purposes of collective bargaining of the bargaining unit employees beginning on June 21, 2012 and thereafter, Respondent violated Sections 8(a)(1) and (5) of the Act.
- 5. By withdrawing recognition from the Union on December 6, 2012 absent an actual loss of the Union's majority status, Respondent violated Sections 8(a)(1) and (5) of the Act.
- 6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

# The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act

Having found that Respondent unlawfully refused to bargain with the Union and unlawfully withdrew recognition from the Union as the exclusive collective bargaining

<sup>7</sup> In *Lexus of Concord*, 343 NLRB 851, 853-854 (2004), cited by Respondent, the Board held that the employer did not violate Sections 8(a)(1) and (5) by delaying further negotiations with the union after receiving petitions from the employees stating that they no longer wanted the union to represent them and specifically requesting that the company stop negotiating. Given the petitions, and the fact that the Board's decision in *Levitz* was issued three days after Respondent received them, the Board held that the hiatus in bargaining was not unreasonable. *Lexus of Concord*, 343 NLRB at 853-854. Here, by contrast, the petition asks that the collective bargaining agreement "cease" or "terminate" upon its expiration date, and not that Respondent end its negotiations with the Union. Furthermore, Respondent here was announcing a moratorium on bargaining pending the results of the election pursuant to its RM petition, which it clearly was not permitted to do, and not based upon contemporaneous, fundamental changes in the law.

representative of the bargaining unit employees, I recommend that Respondent be ordered to recognize and, upon request, bargain collectively with the Union as the exclusive representative of Respondent's bargaining unit employees with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody that agreement in a signed document.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I issue the following recommended<sup>8</sup>

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# ORDER

Respondent, Pomptonian Food Service, Verona, New Jersey, its officers, agents, successors, and assigns, shall

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- 1. Cease and desist from
- (a) Failing and refusing to bargain with Service Employees International Union, Local 32BJ, as the exclusive representative of the employees in the following appropriate bargaining unit:

All Full-time and Part-time food service workers employed solely by Pomptonian Food Service at its Verona School District facilities.

- (b) Withdrawing recognition from Service Employees International Union, Local 32BJ as
   25 the exclusive representative for the purposes of collective bargaining of the bargaining unit described above.
  - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
    - 2. Take the following affirmative action necessary to effectuate the policies of the Act
  - (a) Recognize and, on request, bargain in good faith with Service Employees International Union, Local 32BJ, as the exclusive collective bargaining representative of all full-time and part-time food services workers employed solely by Pomptonian Food Service at its Verona School District facilities, with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody such agreement in a signed document.
  - (b) Within 14 days after service by the Region, post at its Verona New Jersey School District facilities, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are

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<sup>&</sup>lt;sup>8</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>&</sup>lt;sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, 5 defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since 10 June 1, 2012. (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply. 15 Dated: Washington, DC March 7, 2014 Lauren Esposito Administrative Law Judge 20 25 30 35 40 45

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# **APPENDIX**

#### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

# FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT refuse to recognize Service Employees International Union, Local 32BJ, as the exclusive representative for the purposes of collective bargaining of the employees in the following bargaining unit:

All Full-time and Part-time food service workers employed solely by Pomptonian Food Service at its Verona School District facilities.

WE WILL NOT refuse to bargain in good faith with Service Employees International Union, Local 32BJ, as the exclusive bargaining representative of the bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL recognize and, on request of the Union, bargain in good faith with the Union as the exclusive representative of our employees in the bargaining unit described above regarding the employees' wages, hours, and other terms and conditions of employment, and, if an agreement is reached, embody that agreement in a signed document.

		POMPTONIAN FOOD SERVICE		
		(Employer)		
Dated	Ву			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

20 Washington Place, 5th Floor Newark, New Jersey 07102-3110 Hours: 8:30 a.m. to 5 p.m. 973-645-2100

# THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.